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IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

JARMON THOMAS CONWAY

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

JURISDICTION

Jurisdiction is invoked under Section 311, Title 50, United States Code Annotated, said statute being set forth in the 1942 Cumulative Pocket Part to Title 50 of the United States Code Annotated, page 130 of said pocket part which provides in substance that any person who shall knowingly fail or neglect to perform any duty required of him under the provisions of the Selective Service and Training Act of 1940, or the rules and regulations and directions thereunder shall upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000 or by both such fine and imprisonment.

INDICTMENT

Violation 50 U. S. C. 311 (Selective Training and Service Act.)

United States of America,
District of Arizona—ss.

In the District Court of the United States in and for the District of Arizona, at the November Term Thereof, A. D. 1942.

The Grand Jurors of the United States, impaneled, sworn and charged at the term aforesaid, of the Court aforesaid, on their oath present that on the 14th day of May, 1942, at Glendale, Arizona, and within the jurisdiction of this Court, Jarmon Thomas Conway, whose full and true name other than as given herein is to the Grand Jurors unknown, being then and there a person liable for training and service under the Selective Training and Service Act of 1940, and the amendments thereto, and having theretofore registered under said Act, knowingly, wilfully, unlawfully, and feloniously did fail and neglect to perform a duty required of him under and in the execution of said Act and the Rules and Regulations duly made pursuant thereto, in this, that the said Jarmon Thomas Conway, having been classified in Class IV-E by his local board, being Maricopa County Local Board No. 6, created and located in Maricopa County, Arizona, under and by virtue of the provisions of the Selective Training and Service Act of 1940, as amended, and the Rules and Regulations issued thereunder, and said defendant having been duly assigned by said board to work of national importance under civilian direction, and having been duly ordered and notified by said board to report for work of national importance under civilian

direction, a copy of which said order and notice is in words and figures as follows, to-wit:

“Local Board No. 6	81
Maricopa County	013
	006

May 4, 1942
(Date of mailing)

May 4, 1942
213 E. Glendale Ave.
Glendale, Arizona
(Stamp of local board)

**Order To Report For Work Of National
Importance**

The President of the United States,

To Jarmon (first name), Thomas (middle name),
Conway (last name)
Home address Route 11, Box 1170, Phoenix, Arizona.
Order No. 1938

Greeting:

Having submitted yourself to a local board composed of your neighbors and having been classified under the provision of the Selective Training and Service Act of 1940, as amended, as a conscientious objector to both combatant and noncombatant military service (Class IV-E), you have been assigned to work of national importance under civilian direction. You have been assigned to the Civilian Public Service No. 31 Camp, located at Placerville, California, in the State of California.

The Selective Service System will furnish you transportation to the camp, provided you first go to your

local board named above and obtain the proper instructions and papers.

You will, therefore, report to the local board named above at 9:30 A. M. (time) on the 14th day of May, 1942. Local Board Address: 213 E. Glendale, Glendale, Arizona.

You will be examined at the camp for communicable diseases, and you will then be instructed as to your duties.

Wilful failure to report promptly to this local board at the hour and on the day named in this notice is a violation of the Selective Training and Service Act of 1940, as amended, and may subject you to a fine and imprisonment.

You must keep this form and take it with you when you report to your local board.

(Signed) J. S. BRAZILL
Member of Local Board

The action of said local board, as aforesaid, being pursuant to the power conferred upon said board by the Selective Training and Service Act of 1940, and the amendments thereto, and the Rules and Regulations duly made pursuant thereto, knowingly, wilfully, unlawfully and feloniously did fail and neglect to report to his said local board at 9:30 A. M. on the 14th day of May, 1942, or at any other time, for work of national importance under civilian direction, as he was required to do by said order.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

F. E. FLYNN
United States Attorney.

Indictment A true bill, Sam W. Seany Foreman.
(Endorsed) : Filed Jan. 28, 1943

PLEA OF NOT GUILTY

The appellant, Jarmon Thomas Conway, entered a plea of not guilty upon his arraignment.

TRIAL

The cause herein came on regularly for trial in the District Court of Arizona before the Honorable Dave W. Ling presiding with a jury on the 9th day of April, 1943, at Phoenix, Arizona.

STATEMENT

The appellant, Jarmon Thomas Conway, is a member of Jehovah's witnesses, a Christian Society engaged in the teaching and preaching of the Bible and is opposed to war. The said appellant, Jarmon Thomas Conway, registered under the Selective Service Act of 1940, being Title 50, U. S. C. A.-Ch. 301-311, on June 3, 1941. He was thereafter classified as IV-E by the Local Selective Service Board at Glendale, Arizona on October 28, 1941 from which classification appellant appealed to the Board of Appeals which on January 23, 1942 classified the appellant in Class IV, subdivision E. (T.R.22). The Transcript of Record (T.R. page 22) that under the heading "Minutes of Other Action" that on November 25, 1941 the Board of Appeals found that Appellant should not be classed in IV (other than IV-E Class III, Class II or Class I-H. The appellant was thereafter ordered to report for work of national importance under civilian direction.

Thereafter, and pursuant to Selective Service Rules and Regulations (Sec. 628.1) requested the State

Director to enter a further appeal (T.R.57), which was denied. The questionnaire of appellant (Government's Exhibit No. 2 in Evidence (T.R.21) show that appellant stated in said questionnaire as follows: "I am a minister of religion." "I do customarily serve as a minister." "I have been a minister of Jehovah's witnesses since October, 1938." Such statements clearly showing that the appellant claimed ministerial status.

Government's Exhibit No. 4 in evidence discloses that appellant was opposed to armed conflict and that he had preached the Gospel of the Kingdom of Jehovah God from door to door since October, 1938. (T.R.29) That he had given public expression since engaging in this work and had gone from door to door in Phoenix and vicinity preaching the word of Jehovah and distributing written Bible prophesy. (T.R.30) That he was a member of Jehovah's witnesses. (T.R.31).

Government's Exhibit No. 5 in evidence (T.R.34) discloses that appellant claimed that he should be properly classified in class IV-D (Regular Minister).

Government's Exhibit No. 6 (T.R.29-40) shows that appellant made further claim to classification IV-D and said exhibit sets forth sections of the Selective Service Act and Rules and Regulations of said Act providing for such classification. Government's Exhibit No. 6 further discloses that under "Opinion No. 14 of National Headquarters Selective Service System" the ministerial status of Jehovah's witnesses should be considered by Selective Service Boards in accordance with whatever status the other members of the society regarded the registrant. See Govern-

ment Exhibit No. 6, Vol. III-Opinion No. 14-National Headquarters, Selective Service System.

Government's Exhibit No. 3 (T.R.-25) shows conclusively that the Glendale, Arizona Local Selective Service Board found appellant, Jarmon Thomas Conway, "Qualified for general military service IV-E" on October 25, 1941.

Subsequently and on May 21, 1942 the appellant was ordered to report to Induction Station on May 14, 1942. The appellant reported as per orders and refused to go to a conscientious objector's camp on May 14, 1942.

The appellant herein was subsequently indicted and tried for failure to obey orders of the Local Selective Service Board at Glendale, Arizona and was tried and found guilty in his first trial on November 17, 1942. This case was appealed to the Circuit Court of Appeals for the Ninth District which case was docketed in said court on December 23, 1942 under No. 10332, and a reporter's transcript of said trial was filed in said case, said reporter's transcript being referred to later in this brief.

The United States Circuit Court of Appeals on January 15, 1943 on motion of the District Attorney for the District of Arizona reversed the judgment of the District Court in cause 10332—Jarmon Thomas Conway vs. United States of America on authority of Robert Earl Hopper, appellant, vs. United States of America, appellee, No. 10,110, decided December 18, 1942 in U. S. Circuit Court of Appeals for the Ninth District.

The appellant, Jarmon Thomas Conway, was re-indicted and tried on the same charge in the instant case, found guilty, and this appeal follows conviction upon the charge as laid in the indictment.

SPECIFICATIONS OF ERROR

Appellant, Jarmon Thomas Conway, relies upon the Assignments of Error set forth under the appropriate specification to which they relate, which assignments are set forth in full under their separate specification. The separate specifications and questions involved are covered by the Assignments of Error as follows:

Specification Of Error No. I

The indictment is fatally defective because: (a) It does not state facts to constitute a crime or offense.

U. S. vs. Cruickshank, 92 U. S. 542;
U. S. vs. Britton, 107 U. S. 655;
Harris vs. U. S., 104 Fed (2nd) 41;
Kane vs. U. S., 120 Fed (2nd) 990;
Pettibone vs. U. S., 148 U. S. 197

(b) That the indictment failed to state that the action of the Glendale, Arizona Local Selective Service Board acted in accordance with the rules and regulations of the Selective Service System or that it acted in accordance with the Selective Service Act and the provisions thereunder. That the indictment failed to show that the appellant was properly classified or that the orders of the board were in accordance with the rules, regulations and laws pertaining to the Selective Service System.

U. S. vs. Cruickshank, 92 U. S. 542;
U. S. vs. Britton, 107 U. S. 655;
Harris vs. U. S., 104 Fed (2nd) 41;
Kane vs. U. S., 120 Fed (2nd) 990;
Pettibone vs. U. S., 148 U. S. 197.

(c) That the appellant had been tried before the District Court for this same offense and that indictment

under this cause constitutes double jeopardy. This portion of the specification of error as it pertains to the indictment and claiming double jeopardy is waived.

Specification of Error No. II

The Court erred in overruling defendant's objection to Exhibit No. 7 in evidence to which defendant excepted, said Government Exhibit Number 7 being a letter from A. M. Tuthill, State Director of Selective Service of the State of Arizona to J. S. Brazill, Chairman Maricopa County Local Board No. 6, Glendale, Arizona, as follows:

Answering your telephoned request of November 15, 1941, the name of Jarmon Thomas Conway does not appear in the official list of Jehovah's Witnesses known as "Bethel Family" and as "Pioneers" as furnished this office by National Headquarters, Selective Service System.

This letter, it is contended by the defendant is immaterial, and prejudicial to the defendant in that under Selective Service Opinion No. 14 (see Government's Exhibit Number 6) it is provided that in regards to members of Jehovah's Witnesses, "It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the Local Board, based on whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether or not they are regarded by other

Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded. As may be seen from the above opinion, each case must stand upon its own merits and a statement as to whether or not the defendant's name appeared on the roll of "Bethel Family" or "Pioneers" would not have a conclusive bearing on the question as to whether or not the defendant was a "minister." (T.R.66-67).

Consequently admission of the Tuthill letter was prejudicial error and the statement therein contained when considered in light of "Opinion Number 14 of National Headquarters, Selective Service System" is immaterial.

The rules and regulations of the Selective Service System have been given the status of a law insofar as the courts are concerned and the National Headquarters's Opinion as to the ministerial status of Jehovah's Witnesses constitutes the rule of the Selective Service Boards. Hence a finding that appellant was not a minister because he was not on the "Pioneer" or "Bethel Family" list is clearly inadequate and an order based on such finding is invalid as the Local Selective Service Board failed to conform the law as set forth by rules and regulations binding them.

See Dissenting Opinion Justice Jackson in *Bowles vs. U. S.*, 87 Law Edition, Page 919;

U. S. vs. Johnson, 126 Fed (2nd) 242.

Justice Jackson stated as follows: "I did not readily assume that, whatever may be the consequences of refusing to report for induction, court must convict and punish one for disobedience of an unlawful order by whomsoever made." See Page 922.

Specification of Error No. III

That the Honorable Court erred in overruling defendant's objection to the receipt in evidence of Government's Exhibit No 11 in evidence, which purports to be a letter from James Stokeley, Clerk of the Board of Appeals, Selective Service System to the Chairman of Maricopa County Local Board No. 6, Glendale, Arizona, returning records in connection with the appeal of the defendant herein and affirming classification of registrant in Class IV-E for the reason that said letter was immaterial due to the fact that the defendant was denied a proper hearing as to his qualifications and as a minister and any purported decision based on a file of defendant's case where no hearing had ever been granted to him regarding his classification either before the Local Board or the Board of Appeals would be and is incompetent, and immaterial. (T.R.-67).

In connection with the above specification of error the following testimony was introduced on behalf of the Government during the trial of the cause. (See T.R. 53-54.)

(Testimony of James Stokeley).

Q. I hand you Government's Exhibit No. 11 for identification, and ask you if that is your signature.

A. That is my signature.

Q. And I will ask you if that letter accompanied the file when it was returned to the Local Board at Glendale.? A. Yes, it did.

Mr. Walsh: I offer it in evidence.

Mr. Chester: Your honor, I object to this being

offered in evidence due to the fact that it is immaterial and has nothing whatsoever to do, so far as I can see, with the man's classification as a minister.

The Court: Well, he was not classified as a minister. It may be received.

Mr. Chester: Exception.

(The document was received as Government's Exhibit 11 in Evidence, being a letter from James Stokeley, Clerk Board of appeals, Selective Service System to Chairman Maricopa County Local Board No. 6, Glendale, Arizona, returning the records in connection with the appeal of Jarmon Thomas Conway, and affirming the clasification of registrant in Class IV-E.)

Thereafter Witness Stokeley testified as follows:

Mr. Walsh: Q. That letter was written, Mr. Stokeley, in the capacity as Clerk of the Board?

A. Yes, sir.

Q. And upon the authority of the Board?

A. Yes, sir.

Mr. Walsh: That is all.

This letter has no bearing on whether or not the appellant disobeyed an order of the draft board and in the absence of any proof of a hearing before the board, is self-serving as to the Government and prejudicial to appellant. There was never shown by the government that appellant was given a hearing and allowed to present evidence to support his contention that he was entitled to classification IV-D.

Specification of Error No. IV

That the Honorable Court erred in sustaining the Government's objections to the introduction in evidence of Defendant's Exhibit A being some 47 affidavits of Jehovah's Witnesses affirming the fact that the affiants regarded the defendant as a minister for the reason that such affidavits would tend to prove that the order of the Maricopa County Local Board No. 6 to appear for work under civilian direction was an unlawful order in that it violated the rules of the Selective Service System by wrong classification of a registrant and by the issuance of orders pursuant to such unlawful classification. Admission of said affidavits in evidence would tend to disprove intent to violate any lawful order of the Maricopa County Local Board No. 6 issued to the defendant. It is the contention of the defendant that the Court is not bound to convict and punish one for disobedience of an unlawful order by whomsoever made. (T.R.67-68).

(Testimony of Jarmon Thomas Conway). (T.R.60).

Thereupon the following proceedings were had:

Mr. Chester: Q. I hand you these affidavits, Mr. Conway, and ask you if you know what they are?

Mr. Walsh: I object to that, the affidavits speak for themselves, your Honor.

The Court: He may answer.

Mr. Chester: Q. Do you know what they are?

A. Yes, affidavits signed by—

The Court: (Interrupting) That is all right, they are affidavits.

Mr. Chester: And did you have these executed by the persons that signed them, yourself?

A. Yes.

Mr. Walsh: Are you offering them?

Mr. Chester: I am offering them.

Mr. Walsh: We object to them, your Honor, on the ground that they are irrelevant and immaterial and have no bearing on any issues in this case.

The Court: The objection is sustained.

Mr. Chester: Exception. (T.R.60).

It is further contention of appellant that admission of said affidavits would tend to prove that appellant was never allowed full and fair hearing before the local Selective Service Board No. 6, Glendale, Maricopa County, Arizona, or before the appeal board. No hearing was ever had where appellant was allowed to appear and produce evidence as to his correct classification. This is in violation of Article 5 of the Constitution of the United States and as construed and applied deprives appellant of liberty and property without due process of law.

Specification of Error No. V

The Honorable Court erred in denying the motion of the defendant for a directed verdict, said directed verdict having been requested by the defendant for the reason that the Maricopa County Local Board No. 6 of Glendale, Arizona had found the defendant fit for general service, which automatically put him into the class that should, under Selective Service Regulations, place him as an inductee in non-combatant service in the armed forces. The said Local Board, instead of following rules and regulations of the Selective Service Board, ordered the defendant to a conscientious objectors' camp. It has been held hereto-

fore by the United States Circuit Court of Appeals for the Ninth Circuit that a conscientious objector, found fit for "general service" is required to obey only an order for induction for service into the land or naval forces and that a Local Board has no power to "assign" such registrant to work of national importance under civilian direction and order him to report to such authorities. The Circuit Court held that, "It is no violation of Section 311 of the Act to fail to obey an order which the Board had no power to make."

(Testimony of Jarmon Thomas Conway.) (T.R.61).

Mr. Chester: At this time I should like to move for a directed verdict, for the reason—in favor of the defendant, for the reason that the Board as has been admitted by this Board here, found him fit for general service, which automatically puts him into the class that should be inducted in non-combatant service in the armed forces. Instead of following the rules and regulations of the Selective Service Board as is set forth, they ordered him to a conscientious objectors' camp.

The Court: The motion is denied. Go ahead with your argument. (T.R.61).

Ref.:—Robert Earl Hopper vs. United States of America—United States Circuit Court of Appeals for the Ninth District—No. 10,110, Decided December 18th, 1942.

Specification of Error No. VI

That the Honorable Court erred in refusing to give to the jury the defendant's requested instructions and further erred in the court's instruction to the jury to the effect that the defendant cannot offer as a defense

that the order of the Board is arbitrary and capricious, this latter instruction patently violates the constitutional provisions guaranteeing due process of law and the right of freedom of the person and freedom of religion. Defendant duly excepted to the Court's failure to grant his requested instructions and to the Court's granting or giving instruction depriving defendant of defense where the Board acted in an arbitrary and capricious manner. (T.R.69).

Requested instructions were as follows: (T.R.62-63).

1. The Selective Service Board cannot bind a registrant by an arbitrary classification against all of the substantial information before it as to his proper classification. Classifications by such agency must, under the powers given it by Congress be honestly made, and a classification made in the teeth of all substantial evidence before such agency is not honest but arbitrary.

2. An individual cannot be deprived of his rights of freedom of person even in war time, except through machinery which guarantees the fundamentals of "Due Process of Law" and a classification by a Selective Service Board not supported by any evidence is arbitrary and constitutes an abuse of discretion depriving defendant of due process of law and his right to freedom of religion guaranteed under the Constitution of the United States.

3. As to conscientious objectors, it is apparent that they may be required to serve in non-combatant work either by induction into the land or naval forces or by assignment to work under civilian direction. If a conscientious objector is found by the Board to be that of one whose claim that he is a conscientious objector has been sustained by the Board for "induction" into

the land or naval forces for non-combatant service, he cannot be required by the Board to be assigned to serve under civilian direction, and violates no duty required of him under the Act if he fails to report for such service.

4. The provision that one who shall "knowingly" fail or neglect to perform duty required by Selective Service Act shall be subject to certain penalties implies wilful knowledge and a specific intent and defendants in selective service cases are permitted to give their reasons for failure to obey, as going to intent.

W. H. CHESTER,
Attorney for defendant,
412 Phoenix National Bank Bldg.
Phoenix, Arizona.

(Which instructions were not given).

Thereafter, after argument, the Court instructed the jury in part as follows:

You are instructed that even if a Local Draft Board acts in an arbitrary and capricious manner, or denies a registrant a full and fair hearing, nevertheless the registrant must comply with the Board's order. The registrant may not disobey the Board's orders and then defend his dereliction by collaterally attacking the Board's administrative acts. In other words, the registrant may not lawfully disobey the Local Draft Board's order, some arbitrary or capricious act of the Board in determining his classification and issuing the order.

Any Exceptions? I have refused your requested instructions.

Mr. Chester: I take exceptions to the Court's refusal to give the defendant's requested instructions, and I also take exception to the instructions wherein the Court makes the statement on the decision of the Selective Service Board as being final except where an appeal is taken, and to the instruction that defendant cannot offer as defense that the order of the Board is arbitrary and capricious, as that violates the due process of law and the provisions of the Constitution. (T.R.63-64).

ARGUMENT

Assignment of Error No. I

That on the 17th day of Feby., 1943, the defendant moved to quash the indictment upon the grounds and for the reasons that said information does not state facts sufficient to constitute a crime or offense and that the indictment failed to state that the action of the Glendale, Arizona local selective service board acted in accordance with the rules and regulations of the Selective Service System or that it acted in accordance with the Selective Service Act and the provisions thereunder. That the indictment failed to show that the defendant was properly classified or that the orders of the board were in accordance with the rules, regulations and laws pertaining to the Selective Service System. That the defendant herein had been heretofore tried before the District Court of the United States for the district of Arizona for the same offense charged in the indictment and that indictment under this cause constitutes double jeopardy. That the Honorable Court erred in denying said motion to quash, which order was entered on the 17th day of February, 1943. (T.R.65-66).

The indictment is fatally defective because: (a) The indictment failed to state that the action of the Glendale, Arizona Local Selective Service Board acted in accordance with the rules and regulations of the Selective Service System or that it acted in accordance with the Selective Service Act and the provisions thereunder. That the indictment failed to show that the appellant was properly classified or that the orders

of the board were in accordance with the rules, regulations and laws pertaining to the Selective Service System.

U. S. vs. Cruickshank, 92 U. S. 542;
U. S. vs. Britton, 107 U. S. 655;
Harris vs. U. S., 104 Fed (2nd) 41;
Kane vs. U. S., 120 Fed (2nd) 990;
Pettibone vs. U. S., 148 U. S. 197.

(b) The appellant had been tried before the District Court for this same offense and that indictment under this cause constitutes double jeopardy. This portion of the assignment of error as it pertains to the indictment and claiming double jeopardy is waived.

Assignment of Error No. II

The Court erred in overruling defendant's objection to Exhibit number 7 in evidence to which defendant excepted, said Government Exhibit Number 7 being a letter from A. M. Tuthill, State Director Selective Service of the State of Arizona to J. S. Brazill, Chairman Maricopa County Local Board No. 6, Glendale, Arizona, as follows:

Answering your telephoned request of November 15, 1941, the name of Jarmon Thomas Conway does not appear in the official list of Jehovah's Witnesses known as "Bethel Family" and as "Pioneers" as furnished this office by National Headquarters, Selective Service System.

This letter, it is contended by the defendant is immaterial, and prejudicial to the defendant in that under Selective Service Opinion Number 14 (see Government's Exhibit Number 6) it is provided that in regards to members of Jehovah's Witnesses, "It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the Local Board, based on whether or not they devote their lives in the furtherance of the beliefs of

Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded? As may be seen from above opinion, each case must stand upon its own merits and a statement as to whether or not the defendants name appeared on the roll of "Bethel Family" or "Pioneers" would not have a conclusive bearing on the question as to whether or not the defendant was a "minister". (T.R.66-67).

(Testimony of Thomas B. Riordan.) (T.R.41-43).

And Witness Riordan thereafter testified as follows:

Mr. Walsh: Q. I believe you testified a while ago, Mr. Riordan, that you had checked a list of the ministers of Jehovah's Witnesses in your office at Glendale? A. Yes, sir.

Q. Did you on behalf of the Board, make any further investigation as to whether or not the defendant Conway was on any list of ministers of the sect known as Jehovah's Witnesses?

A. Yes; I did.

Q. What did you do in that regard?

A. Well, I thought maybe that there might be a revised list or there might be a later list that his name would appear on, so I called our State Headquarters to ask them whether or not they had a list down there of—a revised list of Jehovah Witness ministers, and asked them to check their list to ascertain whether or not Jarmon Thomas Conway was on that list, listed as a minister.

Q. Did you receive any report from your State Headquarters in that regard?

A. I did, yes, sir.

Mr. Walsh: May this be marked?

(The document was marked as Government's Exhibit 7 for identification)

Mr. Walsh: Q. I hand you Government's Exhibit 7 for identification and ask you if that is the report which you received?

A. Yes; that is the report that I received from our State Headquarters.

Q. And this is part of the Local Board's file in relation to this defendant? A. Yes; it is.

Mr. Walsh: I offer it in evidence.

Mr. Chester: Well, your Honor, I object to this particular letter here as immaterial. The question qualifying a man, whether he is a minister or not does not depend whether his name is shown on the list. In accordance with your Exhibit No. 6, Opinion No. 14 of the Selective Service Board, there is nothing in that opinion that shows a man has to appear on that list.

Mr. Walsh: It certainly goes, your Honor, to the question as to whether or not the Board gave him a hearing and what the Board attempted to do in order to decide the thing fairly.

The Court: There would have to be some way of determining whether a man is a minister. Everyone selected under the Selective Service Act would say, "I am a minister, I don't have to go to war", and that would end it.

Mr. Chester: There is nothing in here that says a man is not a minister.

Mr. Walsh: Maybe the court should see the letter.

The Court: Well, it depends on somebody else other than the individual to determine whether he is a minister or not. I say, anybody selected under the Act would say, "I am a minister," and that would end it. It wouldn't make any sense. It may be received.

Mr. Chester: Exception:

(The document was received as Government's Exhibit 7 in evidence).

Being as follows:

GOVERNMENT'S EXHIBIT NUMBER 7
IN EVIDENCE

(Being a letter from A. M. Tuthill, State Director Selective Service, to J. S. Brazill, Chairman, Maricopa County Local Board No. 6, Glendale, Arizona; and reads as follows:)

"Answering your telephoned request of November 15, 1941, the name of Jarmon Thomas Conway does not appear in the official list of Jehovah's Witnesses known as "Bethel Family" and as "Pioneers" as furnished this office by National Headquarters, Selective Service System." (T.R.41-43).

Selective Service Opinion No. 14 provides as follows:

VOL. III OPINION NO. 14 (AMENDED)
NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM

SUBJECT: Ministerial Status of Jehovah's
Witnesses

FACTS: Jehovah's Witnesses claim exemption from training and service and classification in Class IV-D as duly ordained

ministers of religion under section 5 (d), Selective Training and Service Act of 1940, as amended, and section 622.44, Selective Service Regulations, Second Edition, which read as follows:

Section 5(d):

“Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.”

Section 622.44:

“Class IV-D: Minister of religion or divinity student. (a) In class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

“(b) A ‘regular minister of religion’ is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

“(c) A ‘duly ordained minister of religion’ is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties.”

Question.—May Jehovah’s Witnesses be placed in Class IV-D as regular or duly ordained ministers of religion exempt from training and service?

Answer.

1. The Watchtower Bible and Tract Society, Inc., is incorporated under the laws of the State of New York for charitable, religious, and scientific purposes. The unincorporated body of persons known as Jehovah’s Witnesses hold in common certain religious tenets and beliefs and recognize as their terrestrial governing organization the Watchtower Bible and Tract Society, Inc. By their adherence to the organization of this religious corporation, the unincorporated body of Jehovah’s Witnesses are considered to constitute a recognized religious sect.

2. The unusual character of organization of Jehovah’s Witnesses renders comparisons with recognized churches and religious organizations difficult. Certain members of Jehovah’s Witnesses, by reason of the time which they devote, the dedication of their lives which they have made, the attitude of other Jehovah’s Witnesses toward them, and the record kept of them and their work, are in a position where they may be recognized as having a standing in relation to

the organization and the other members of Jehovah's Witnesses similar to that occupied by regular or duly ordained ministers of other religions.

3. Members of the Bethel Family are those members of Jehovah's Witnesses who devote their full time and effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of Jehovah's Witnesses, the purpose of which is to present the beliefs of Jehovah's Witnesses and to convert others. For their religious services, the members of this group receive their subsistence and lodging and in addition a very modest monthly allowance. This group of individuals consists of the office and factory workers at 117 Adams Street, Brooklyn, New York, and workers in the executive offices at 124 Columbia Heights, Brooklyn, New York, and at the Farms. Pioneers of Jehovah's Witnesses are those members of Jehovah's Witnesses who devote all or substantially all of their time to the work of teaching the tenets of their religion and in converting of others to their belief. A certified official list of members of the Bethel Family and Pioneers is being transmitted to the State Directors of Selective Service by National Headquarters of the Selective Service System simultaneously with the release of this amended Opinion. The members of the Bethel Family and Pioneers whose names appear upon such certified official list come within the purview of section 5 (d) of the Selective Training and Service Act of 1940, as amended, and they may be classified in Class IV-D. The status of members of the Bethel Family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of paragraph 5 of this Opinion.

4. The original paragraph 4 has been consolidated with paragraph 3 of this amended Opinion.

5. The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is possible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

6. In the case of Jehovah's Witnesses, as in the case of all other registrants who claim exemption as regular or duly ordained ministers, the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision.

LEWIS B. HERSHEY
Director.

This opinion is set forth as a rule by National Headquarters, Selective Service System, to guide local

Selective Service Boards as regards Jehovah's Witnesses. Clearly the local board in this case did not follow the rule (law) of the Selective Service System and its orders therefore that appellant appear for work of national importance is invalid. It is the contention of the appellant that an invalid order need not be obeyed by whomsoever made.

Bowles vs. United States; (87 S. C. Law Ed. 919)
U. S. vs. Johnson, 126 Fed. (2nd) 242, (headnote 5.)

Assignment of Error No. III

That the Honorable Court erred in overruling defendant's objection to the receipt in evidence of Governments Exhibit No. 11 in evidence, which purports to be a letter from James Stokely, Clerk of the Board of Appeals, Selective Service System to the chairman of Maricopa County Local Board No. 6, Glendale, Arizona, returning records in connection with the appeal of the defendant herein and affirming classification of registrant in Class IV-E for the reason that said letter was immaterial due to the fact that the defendant was denied a proper hearing as to his qualifications and as a minister and any purported decision based on a file of defendant's case where no hearing had ever been granted to him regarding his classification either before the Local Board or the Board of Appeals would be and is incompetent, and immaterial. (T.R.67).

The appellant was never allowed a hearing on his contention that he should be properly classified as a minister. It was approved by the Government that the Local Selective Board No. 6 of Glendale, Arizona considered only the written documents in its file and that Conway never was allowed a hearing before the Board or any appeal board, (see R.T.38), wherein the following questions and answers are set forth:

Mr. CHESTER: Well, I will ask you, did you have

a hearing, Mr. Riordan, to determine whether or not Mr. Conway was a minister?

A. Yes.

Q. And what was the time of that hearing?

A. His questionnaire and his statements in his questionnaire concerning his occupation; questions concerning what he did regarding his being a minister, and the affidavit and all that he had filed, and also the list that we had of the ministers, and also the letter that we had from our headquarters asking them as to whether or not he appeared on any list that they had. (R.T.37-38).

Also see Reporter's Transcript under cause No. 10332, United States Circuit Court of Appeals for Ninth District, page 24, lines 6 to 9 inclusive:

Q. Now, was any testimony taken from the members of the Jehovah's Witness society as to whether or not they considered him a minister?

A. Not to my knowledge.

Also see R.T. cause No. 10332, U. S. Circuit Court of Appeals for Ninth District, page 42-43:

MR. CHESTER: You made your objections to your classification right along. Now, I will ask you this: Were you ever questioned before the Board or before the Appeal Board as to your reasons for stating that your classification be properly in Class 4-D?

A. I never was requested by the Appeal Board.

Q. Did you ever appear before the full Board in a meeting, and were you examined?

A. No. I didn't go before the Board.

Q. Did you ever appear before the Appeal Board?

A. No.

Q. Were you asked to submit any evidence as to your status as a minister?

A. No, I gave them all of the evidence in my questionnaire.

MR. CHESTER: That is all.

At no time did the local board or appeal board take any evidence as to how other members of Jehovah's Witnesses regarded Jarmon Thomas Conway in respect to his status as a minister of their faith.

Assignment of Error No. IV

That the Honorable Court erred in sustaining the Government's objection to the introduction in evidence of Defendant's Exhibit A being some 47 affidavits of Jehovah's Witnesses affirming the fact that affiants regarded the defendant as a minister for the reason that such affidavits would tend to prove that the order of the Maricopa County Local Board No. 6 to appear for work under civilian direction was an unlawful order in that it violated the rules of the Selective Service System by wrong classification of a registrant and by the issuance of orders pursuant to such unlawful classification. Admission of said affidavits in evidence would tend to disprove intent to violate any lawful order of the Maricopa County Local Board No. 6 issued to the defendant. It is the contention of the defendant that the Court is not bound to convict and punish one for disobedience of an unlawful order by whomsoever made. (T.R.67-68).

Defendant's Exhibit A for identification were: (T.R.59-60).

Being 50 affidavits, signed by residents of Arizona, all duly subscribed and sworn to, to the effect that Jarmon Conway was a member of Jehovah's Witnesses and is regarded by affiants and others of the same faith as a duly ordained minister in the same manner

in which regular or duly ordained ministers of other religions are ordinarily regarded. (T.R.59-60).

Bowles vs. United States, 87 S. C. Law Ed 919;
U. S. vs. Johnson, 126 Fed. (2nd) 242.

Assignment of Error No. V

The Honorable Court erred in denying the motion of the defendant for a directed verdict, said directed verdict having been requested by the defendant for the reason that the Maricopa County Local Board No. 6 to Glendale, Arizona had found the defendant fit for general service, which automatically put him into the class that should, under Selective Service Regulations, place him as an inductee in non-combatant service in the armed forces. The said Local Board, instead of following rules and regulations of the Selective Service Board, ordered the defendant to a conscientious objectors' camp. It has been held heretofore by the United States Circuit Court of Appeals for the Ninth Circuit that a conscientious objector, found fit for "general service" is required to obey only an order for induction for service into the land or naval forces and that a Local Board has no power to "assign" such registrant to work of national importance under civilian direction and order him to report to such authorities. The Circuit Court held that, "It is no violation of Section 11 of the Act to fail to obey an order which the Board had no power to make." (T. R. 68-69).

In the case of Robert Earl Hopper vs. United States, the Court held:

To constitute a crime under section 311 of the Act, the accused man must "knowingly fail or neglect to perform some duty required of him under this Act." 50 U.S.C.A. Sec. 311. In order to impose a duty on a registrant under the Act, the local Selective Service Board, hereafter called Board, must classify him in one of three general classes; (a) as a combatant for "induction" into the land or naval forces of the United States (Act No. 4 (a), No. 3 (a), 50 U.S.C.A. 304, 303):

(b) as one whose claim that he is a conscientious objector has been "sustained" by the Board for "induction" into the land or naval forces for noncombatant service (Act, No. 5 (g), 50 U.S.C.A. 305), and (c) as to sub-class of conscientious objectors whom the Board has "found to be conscientiously opposed to participation in such (land or naval) noncombatant service," to be "assigned to work of national importance under civilian direction," (Act, No. 5 (g), footnote 2, supra).

As to conscientious objectors, it is apparent that they may be required to serve in noncombatant work either by induction into the land or naval forces or by assignment to work under civilian direction. Obviously, if a conscientious objector is "found" by the Board to be in class (b) above described he cannot be assigned to serve under civilian direction, and violates no duty required of him under the Act if he fail to report for such service. Likewise, if in class (c) above described he cannot be required by the Board to be inducted to serve in the land or naval forces and if so ordered would violate no duty imposed by the Act if he failed to present himself for such induction.

Here the defendant was found "fit for general military Service": (R.T. C-6420-Phoenix-page 27).

MR. CHESTER: Q. Mr. Riordan, as to the service this man was qualified for, the Local Board, according to your testimony in a prior case held here, found that he was qualified for general military service, is that correct? (R. T. C-6420-25, 27, 28)

A. That is right, yes, sir.

Government's Exhibit No. 3 in evidence, report of physical examination, Jarmon Thomas Conway: (T.R.25) (T.R.27) (T.R.28).

October 25, 1941.

This local Board finds the person named above is Qualified for general military service 4 E.

J. F. BRAZILL,

Date 10-28-41.

I certify that I have carefully examined and reviewed the record of the examination of the person named herein and that it is my judgment and belief that he is

Qualified for general military service.

Place; Glendale, Arizona, Date October 25, 1941.

(Signed)

M. I. LEFF, M. D.,

Examining Physician.

And the said witness Riordan testified further as follows:

By Mr. Walsh:

Q. Directing your attention to the first page of Government's Exhibit No. 3 in evidence, I will ask you if you know whose signature that is on the first page there.

A. That is the signature of J. S. Brazill, our Chairman of Local Board No. 6 at Glendale.

Q. Would you read the language appearing immediately above his signature there?

A. "This Local Board finds that the person named above is qualified for general military service 4-E. Date 10-28-41. J. S. Brazill, member of Local Board."

Mr. Walsh: May this be marked, please?

(The document was marked as Government's Exhibit 4 for identification.) (T.R.28).

—the defendant was ordered to serve under civilian direction. Under the law he violates no duty required of him under the Act if he fail to report for such service.

Assignment of Error No. VI

That the Honorable Court erred in refusing to give to the jury the defendant's requested instructions and further erred in the court's instruction to the jury to the effect that the defendant cannot offer as a defense that the order of the Board is arbitrary and capricious, this latter instruction patently violates the constitutional provisions guaranteeing due process of law and the right of freedom of the person and freedom of religion. Defendant duly excepted to the Courts failure to grant his requested instructions and to the Court's granting or giving instruction depriving defendant of defense where the Board acted in an arbitrary and capricious manner. (T.R. 69).

Defendant's requested instructions were as follows: (T.R.62-63).

1. The Selective Service Board cannot bind a registrant by any arbitrary classification against all of the substantial information before it as to his proper classification. Classifications by such agency must, under the powers given it by Congress be honestly made, and a classification made in the teeth of all substantial evidence before such agency is not honest but arbitrary.

2. An individual cannot be deprived of his rights of freedom of person even in war time, except through machinery which guarantees the fundamentals of "Due Process of Law" and a classification by a Selective Service Board not supported by any evidence is arbitrary and constitutes an abuse of discretion depriving defendant of due process of law and his right to freedom of religion guaranteed under the Constitution of the United States.

3. As to conscientious objectors, it is apparent that they may be required to serve in non-combatant work either by induction into the land or naval forces or by assignment to work under civilian direction. If a conscientious objector is found by the Board to be that of one whose claim that he is a conscientious objector has been sustained by the Board for "induction" into the land or naval forces for noncombatant service, he cannot be required by the Board to be assigned to serve under civilian direction, and violates no duty required of him under the Act if he fails to report for such service.

4. The provision that one who shall "knowingly" fail or neglect to perform duty required by Selective Service Act shall be subject to certain penalties implies wilful knowledge and a specific intent and defendants in selective service cases are permitted to give their reasons for failure to obey as going to intent.

(Which instructions were not given). (T.R.62-63).

The Court instructed the jury in part as follows: (T.R.63-64).

You are instructed that even if a Local Draft Board acts in an arbitrary and capricious manner, or denies a registrant a full and fair hearing, nevertheless the registrant must comply with the Board's order. The registrant may not disobey the Board's order and then defend his dereliction by collaterally attacking the Board's administrative acts. In other words, the registrant may not lawfully disobey the Local Draft Board's order to report for induction and then offer as a defense for his failure to comply with the Board's order, some arbitrary or capricious Act of the Board in determining his classification and issuing the order.

Any Exceptions? I have refused your requested instructions.

Mr. Chester: I take exceptions to the Court's refusal to give the defendant's requested instructions, and I also take exception to the instruction wherein the Court makes the statement on the decision of the Selective Service Board as being final except where an appeal is taken, and to the instruction that the defendant cannot offer as defense that the order of the Board is arbitrary and capricious, as that violates the due process of law and the provisions of the Constitution. (T.R.63-64).

Defendant's requested instructions followed the law and were proper. The instruction above cited and as given by the court was contrary to law.

U. S. vs. Johnson, 126 Fed (2nd) 242;
Angellus vs. Sullivan, 246 Fed 54;
Ex Parte Stewart, 47 Fed Supp. 410;
Boitano vs. District Board, 250 Fed. 812;
U. S. vs. Kinkead, 250 Fed 692;
St. Joseph Stockyards vs. U. S., 298 U. S. 38.

It follows that the Court should have directed the verdict and left the defendant where it found him subject under the law to the further orders of his Local Board.

It is respectfully submitted that the Judgment of the District Court should be reversed.

Dated, Phoenix, Arizona.

August 30, 1943.

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